BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through IX pertaining to bank debt cancellation contracts and debt suspension agreements	) NOTICE OF ADOPTION

TO: All Concerned Persons

1. On August 11, 2011, the Department of Administration published MAR Notice No. 2-59-452 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 1430 of the 2011 Montana Administrative Register, Issue Number 15.

2. The department has adopted the following rules as proposed: NEW RULE IV (2.59.119), NEW RULE V (2.59.120), NEW RULE VI (2.59.121), and NEW RULE VIII (2.59.123).

3. The department has adopted the following proposed rules with changes, new material underlined, deleted material interlined:

<u>NEW RULE I (2.59.116) DEFINITIONS</u> (1) through (3) remain as proposed.

(4) "Debt cancellation contract" means a loan term or contractual arrangement modifying loan terms under which a bank agrees, for a fee, to suspend all or part of a customer's obligation to repay an extension of credit from that bank upon the occurrence of a specified event. The agreement must specify the extension of credit to which it pertains. <u>The extension of credit to which it pertains may be a direct loan made by the bank or an indirect loan in the form of a retail installment sales contract purchased by or assigned to the bank. In the case of an indirect loan in the form of a retail installment sales contract, the debt cancellation contract may be offered by the bank through a nonexclusive, unaffiliated agent contingent upon the bank purchasing or taking assignment of the indirect loan.</u> The agreement may be separate from or a part of other loan documents. A debt cancellation contract may be offered and purchased either contemporaneously with the other terms of the loan agreement or subsequently.

(5) "Debt suspension agreement" means a loan term or contractual arrangement modifying loan terms under which a bank agrees, for a fee, to suspend all or part of a customer's obligation to repay an extension of credit from that bank upon the occurrence of a specified event. The agreement must specify the extension of credit to which it pertains. <u>The extension of credit may be a direct loan made by the bank or an indirect loan in the form of a retail installment sales contract purchased by or assigned to the bank. In the case of an indirect loan in the form of a retail installment sales contract, the debt suspension agreement may be offered by the bank through a nonexclusive, unaffiliated agent contingent upon the bank purchasing or taking assignment of the indirect loan.</u> The agreement may be separate from or a part of other loan documents. The term "debt suspension

agreement" does not include loan payment deferral arrangements in which the triggering event is the borrower's unilateral election to defer repayment or the bank's unilateral decision to allow a deferral of repayment.

(6) "Guaranteed asset protection (GAP) waiver or agreement" means a term of an extension of credit or contractual arrangement modifying terms of an extension of credit for the purchase of titled personal property under which a bank agrees to cancel the customer's obligation to repay the portion of the extension of credit that exceeds the amount paid by the primary insurer of the titled personal property upon the insurer's declaration that the titled personal property is a total loss or determination that the titled personal property is stolen and not recoverable.

(7) "Loan" or "extension of credit" means a direct or indirect advance of funds to a customer made on the basis of any obligation of that customer to repay the funds or that is repayable from specific property pledged by or on the customer's behalf. The term also includes any liability of a bank to advance funds to or on behalf of a customer pursuant to a contractual commitment.

(8) remains as proposed.

NEW RULE II (2.59.117) DEBT CANCELLATION AND DEBT SUSPENSION PROGRAMS – REQUIREMENTS (1) through (1)(a)(iii) remain as proposed.

(b) obtain and maintain in effect insurance ~~approved by the~~ from an insurer authorized or otherwise registered with the State Auditor and Commissioner of Insurance (State Auditor) ~~to cover all of the bank's risk associated with its debt cancellation contracts and debt suspension agreements~~ to do business in Montana, except as provided in (2). The insurance must cover 100% of the at-risk loan balances to which the bank's debt cancellation contracts pertain.

(2) An insurer authorized by the insurance regulator in an out-of-state bank's home state that has issued a policy to the out-of-state bank covering all of its debt cancellation contractual liabilities need not be authorized or otherwise registered with the State Auditor.

NEW RULE III (2.59.118) REQUIRED DISCLOSURES (1) A bank shall provide the following disclosures to the bank's customer ~~at the time of offering the customer a debt cancellation contract or debt suspension agreement~~:

(a) and (b) remain as proposed.

(c) ~~any~~ the refund policy ~~if the fee is paid in a single payment and added to the amount borrowed~~;

(d) through (g) remain as proposed.

(2) The requirements for the timing and method of disclosure are:

(a) the bank shall make the disclosures in (1) and the short-form disclosures under ARM 2.59.123 orally at the time the bank first solicits the purchase of a contract;

(b) the bank shall make the long-form disclosures under ARM 2.59.123 in writing before the customer completes the purchase of the contract. If the initial solicitation occurs in person, the bank shall provide the long-form disclosure in writing at that time;

(c) if the contract is solicited by telephone, the bank shall provide the disclosures in (1) and the short-form disclosures under ARM 2.59.123 orally and shall mail the long-form disclosures, and, if appropriate, a copy of the contract to the customer within three business days beginning on the first business day after the telephone solicitation; and

(d) if the contract is solicited through written materials such as mail inserts or "take one" applications, the bank may provide only the disclosures in (1) and the short-form disclosure under ARM 2.59.123 to the customer within three business days beginning on the first business day after the customer contacts the bank in response to the solicitation, subject to the requirements of ARM 2.59.122(3)(b).

(3) The disclosures required by these rules must be conspicuous, simple, direct, readily understandable, and designed to call attention to the nature and significance of the information provided. The methods may include use of plain language headings, easily readable typeface and size, wide margins and ample line spacing, boldface or italics for key words, and/or distinctive type style or graphic devices.

(4) The disclosures in the short-form disclosure under ARM 2.59.123 are required in advertisements and promotional material for contracts unless the advertisements and promotional materials are of a general nature describing or listing the services or products offered by the bank.

(5) The disclosures described in these rules may be provided through electronic media in a manner consistent with the requirements of the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq. or the Uniform Electronic Transaction Act, Title 30, chapter 18, part 1, MCA.

NEW RULE VII (2.59.122) AFFIRMATIVE ELECTION TO PURCHASE AND ACKNOWLEDGMENT OF RECEIPT OF DISCLOSURES (1) through (3)(b)(iii) remain as proposed.

(4) The affirmative election and acknowledgment may be made electronically in a manner consistent with the requirements of the Electronic Signatures in Global and National Commerce Act, 15 USC 7001 et seq. ~~and~~ or the Uniform Electronic Transaction Act, Title 30, chapter 18, part 1, MCA.

NEW RULE IX (2.59.124) GUARANTEED ASSET PROTECTION (GAP) FEATURE (1) A GAP waiver or agreement is a type of debt cancellation contract. A debt cancellation contract with a GAP feature offered in connection with an extension of credit for the purchase of titled personal property for personal, family, or household use is a single product ~~and does not require a separate agreement related to financing for the GAP feature~~. A bank offering a debt cancellation contract with a GAP feature may do so through nonexclusive, unaffiliated agents such as automobile dealers. The fee arrangement between a bank and a nonexclusive, unaffiliated agent through which the debt cancellation product is offered does not create a separate contract that violates the anti-tying provision of ARM 2.59.119(1)(a).

4. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A comment was received from a guaranteed asset protection (GAP) membership organization whose members include insurance companies, creditors, and administrative services companies that bring GAP products to market. The commenter's stated mission is to promote equitable legislation and regulation of its members and their products so that meaningful options are available to consumers. The organization had two comments concerning proposed NEW RULE IX: 1) that the proposed rule creates an ambiguity by referring to GAP as a feature of a debt cancellation contract rather than as a stand-alone product, i.e., as a type of debt cancellation contract; and 2) the proposed rule is too limited in its scope and the department should authorize automobile dealers to offer debt cancellation products in conjunction with retail installment sales contracts that the dealers will in turn sell or assign to non-bank entities. The commenter acknowledged that HB 432 might not empower the department to address the second issue in its rulemaking. A copy of the commenting association's own model legislation document was provided to the department.

RESPONSE #1: The department agrees that a GAP contract is a type of debt cancellation product. A sentence has been added to NEW RULE IX to make that clear.

The department agrees that if it adopted a rule purporting to authorize automobile dealers to offer debt cancellation products in conjunction with retail installment sales contracts intended to be sold or assigned in the indirect lending market to entities that are not banks, the department would be acting in excess of its legislative authority. Authorization to that effect would have to come from the Legislature. HB 432 sought only to put state-chartered banks and state-chartered credit unions in parity with national banks and federal credit unions that have been authorized by federal regulators for years to offer debt cancellation products in connection with loans or extensions of credit made to their customers or members.

COMMENT #2: A comment was received from legal counsel for a debt cancellation service provider for the lending industry. The commenter states generally that it supports the department's proposed rules to the extent that they track the Office of the Comptroller of the Currency (OCC) regulation at 12 CFR Part 37 which is considered to represent best practices in the industry. The commenter states the OCC regulation provides consumers with sufficient information to make informed decisions and contains appropriate consumer protections. To the extent that the department's rules deviate from the OCC regulation as do NEW RULE II(1)(b) and NEW RULE III(1)(a) and (g), the commenter opposes them and requests that they be removed. More detailed comments made by the commenter about specific proposed rules are included below.

With regard to NEW RULE II(1)(b), the commenter states the requirement that banks obtain insurance to manage the risk associated with offering debt cancellation contracts is unnecessary and unfair because national banks are permitted, but not required, to manage the risk by obtaining insurance.

The commenter objects to the requirement under NEW RULE III(1)(a) that a bank disclose the prohibited practices under NEW RULE IV because the additional information will lengthen the disclosure form making it less likely that consumers will be able to focus on important provisions of the form concerning the terms of the debt cancellation contract.

The commenter objects to the requirement under NEW RULE III(1)(g) that a bank notify the consumer that activation of a debt cancellation contract may result in a tax liability to the consumer. The commenter states that the tax-related disclosure will lengthen the disclosure form and obscure the importance of other key terms that it contains. In addition, the commenter states that a bank is not in a position to give consumers tax advice in response to questions that may arise from the disclosure of a possible tax consequence.

The commenter objects to proposed NEW RULE VIII's adoption of the "OCC short form" disclosures with the Montana modifications because the modifications lengthen the disclosure form, drive up costs for a bank that operates in a multistate environment, and destroy the efficiencies of a uniform system. A bank's increased administrative costs ultimately drive up costs to the consumer.

RESPONSE #2: The department thanks the commenter for submitting a comment.

The department believes the insurance requirement will help to ensure that a bank's debt cancellation program does not impair the institution's safety and soundness and it indirectly provides a measure of consumer protection as well. The department is aware that national banks are permitted, but not required, to manage the associated risk by obtaining insurance. However, the department deems parity between national banks and state-chartered banks on the issue of debt cancellation contracts and debt suspension agreements to be substantially and satisfactorily achieved by HB 432 and these rules. HB 432 expressly authorized the department to adopt rules that are more stringent than the OCC regulations governing national banks' debt cancellation contracts and debt suspension agreements. The department believes that most, if not all, state-chartered banks choosing to offer debt cancellation contracts or debt suspension agreements will engage the services of a program administrator and that contractual liability insurance will or can be a part of the package of program services available to the banks.

The department believes that disclosure of the practices that are prohibited under NEW RULE IV provides valuable information to bank customers about the protections afforded them under the law so that they are in a position to assert those protections if necessary. Although the disclosure of prohibited practices will slightly lengthen the disclosure forms, the department believes that bank customers obtaining loans or modifications of loans are accustomed to the need to review and digest a substantial amount of important information.

The department believes that disclosing to a bank's customer the possibility that activation of a debt cancellation contract could result in a tax liability to the customer is not onerous and that the benefit to the customer of being well-informed at the outset far outweighs the bank's burden to disclose the information. Both parties to the debt cancellation contract are harmed if a tax liability arises later to the surprise of the consumer who then asserts a claim against the bank for negligent or willful misrepresentation. The department believes that it is a good thing if disclosure of a potential tax liability causes the customer to ask questions even if the bank cannot and should not answer them. The bank can inform the customer that the customer may wish to consult with their personal tax advisor before making a decision to purchase a debt cancellation contract. No commenter objected to the disclosure of the potential tax liability on the grounds that the activation of a debt cancellation contract is not a taxable event or provided any legal authority to that effect.

The department believes that the cost would not be great to attach a Montana addendum to a bank's disclosure forms used in a multistate environment (assuming the multistate disclosure form does not conflict with Montana laws or rules). This rule does not require use of the OCC's short-form and long-form disclosures that are available at 12 CFR Part 37, Appendices A and B. Rather, those forms are adopted as models. Banks will have to adapt the model forms to include Montana-specific requirements and to match the scope of the bank's own debt cancellation and debt suspension program.

COMMENT #3: A comment was received by an association that represents both state-chartered and federally chartered banks in Montana. The commenter asks that the department consider the necessity of parity among state and national banks. The commenter stated that NEW RULE IX appears to address only one type of debt cancellation contract offered and sold in the indirect lending market, specifically, a GAP waiver/agreement that is offered and sold by a bank through a nonexclusive, unaffiliated agent such as an automobile dealer that in turn sells its retail installment sales contract to the bank. The commenter noted that debt cancellation contracts that have any number of triggering events besides the triggering events for a GAP waiver/agreement are offered and sold in the indirect lending market by national banks. The commenter requests that the department add a NEW RULE X that otherwise mirrors NEW RULE IX but authorizes a bank to offer and sell debt cancellation contracts, other than GAP waivers/agreements, through nonexclusive, unaffiliated agents that will in turn sell their retail installment sales contracts to the bank.

RESPONSE #3: The department thanks the commenter for its comment, which is well-taken. The definitions of "debt cancellation contract" and "debt suspension agreement" in NEW RULE I have been amended to clarify that those products may be offered by a bank in conjunction with both its direct loans and indirect loans, consistent with the definition of loan or extension of credit in NEW RULE I. In short, the department agrees that any debt cancellation product may be offered and sold by a bank in the indirect lending market through a nonexclusive, unaffiliated agent that will in turn sell or assign the agent's retail installment sales contract to the bank. The department notes that OCC Interpretive Letters #1093 and #1095 make clear, in dicta, that a retail installment sales contract sold or assigned to a bank is treated the same as a loan that is originated by a bank for purposes of offering debt cancellation products. A bank's debt cancellation contract or debt suspension agreement offered through a nonexclusive, unaffiliated agent becomes effective only when the bank purchases or takes assignment of the agent's retail installment sales contract. A bank is only authorized to offer those products in relation to specific loans made to its customers (directly or indirectly).

Amendment of the definitions of "debt cancellation contract" and "debt suspension agreement" in NEW RULE I, consistent with the definition of "loan or extension of credit" in the same rule, is necessary for clarification purposes and to achieve substantial and satisfactory parity between state-chartered banks and national banks consistent with the legislative intent of HB 432. It is the department's intent that a bank's indirect lending program be treated the same as its direct lending program for purposes of debt cancellation contracts and debt suspension agreements authorized under HB 432 and these rules.

COMMENT #4: A comment was submitted by a Washington, D.C. law firm written on its own behalf or on behalf of an unknown client. The commenter stated that the Legislature's statement of intent for Montana's parity statute [32-1-362, MCA] in 1993 provided that the department "should adopt rules that allow state-chartered banks to operate efficiently and in conformity with the standards and procedures governing national banks." The commenter objects to the requirement that the prohibited acts included in NEW RULE IV be disclosed as provided in NEW RULE II(1)(a) and NEW RULE VIII. The commenter states that the disclosure, which has no equivalent or counterpart in 12 CFR Part 37, adds no additional protection to consumers and additional consumer protection is generally the Legislature's rationale when it authorizes rules to be adopted that are more stringent than federal laws. The commenter states the federal law disclosures applicable to national banks are sufficient and there is no reasonable necessity to require disclosure of prohibited acts under NEW RULE IV. The commenter stated there is no reasonable necessity for a consumer to know what is prohibited if the bank cannot do the prohibited act anyway. The commenter urges that if the department deems it necessary to disclose the prohibited acts, that disclosure only be required in the long-form disclosure under NEW RULE VIII(2).

The commenter also objects to the department not including all debt cancellation products offered through nonexclusive agents within its rule, but instead limiting the scope of NEW RULE IX to a debt cancellation product with a GAP feature.

The commenter referred the department to 68 Fed. Reg. 35283 (June 13, 2003) wherein the OCC elected to delay indefinitely the mandatory date for compliance by national banks with certain requirements under 12 CFR 37.4 regarding debt cancellation products offered and sold through nonexclusive, unaffiliated agents in the indirect lending market. The commenter requested that the department delay mandatory compliance by state-chartered banks in the indirect lending context as well.

RESPONSE #4: HB 432 directed the department to adopt rules at least as stringent as the OCC regulations governing national banks' debt cancellation programs. The department believes that consumers who are aware of what acts or practices of a bank are prohibited are in a better position to assert the protections that the law affords them than are consumers who are not aware of the prohibitions. Although the acts and practices in NEW RULE IV are prohibited, that is no assurance that a bank will not run afoul of the rule and engage in a prohibited act or practice in connection with its debt cancellation contracts and debt suspension agreements. A consumer who is well-educated about the parameters of a bank's authority relative to the debt cancellation product is better protected than one who is not.

Regarding the comment concerning the limited scope of NEW RULE IX, the department believes the comment is well-taken and has amended the definitions of "debt cancellation contract" and "debt suspension agreement" to clarify that such products may be offered in conjunction with the bank's direct lending as well as its indirect lending programs, and the type of debt cancellation product is not restricted to GAP waivers.

The department declines to delay the date by which banks must comply with all of the debt cancellation/suspension rules whether the product is offered by the bank in conjunction with an extension of credit made directly by the bank or whether in conjunction with extensions of credit in the form of retail installments sales contracts acquired by the bank on the indirect lending market. Debt protection products are only offered by banks. In the indirect lending context, a bank makes the offer through a nonexclusive, unaffiliated agent. The department is unwilling to have different standards relating to periodic payment options, refund options, disclosure requirements, and acknowledgments of receipt for customers who purchase the product directly from the bank and those who purchase the product through the bank's nonexclusive, unaffiliated agent. The department does not regulate and has no authority over automobile dealers or other nonexclusive, unaffiliated agents of banks to assure that customers dealing with agents are afforded the protections and options that these rules provide. Banks must comply with all rules pertaining to the products they offer. A bank can address and resolve unique problems associated with the distribution channels and fee arrangements in the indirect lending context by carefully crafting the terms of a sale/purchase agreement by which the bank indirectly acquires the loan. A bank may delay offering debt protection products in its indirect lending program, but it may not implement such a program and then fail to comply with the rules upon the date that the rules become effective.

COMMENT #5: A comment was submitted to the department by legal counsel for a risk retention trade association representing the risk retention, alternative risk, and risk purchasing group industry. The commenter objects to proposed NEW RULE II(1)(b) because it effectively prohibits state-chartered banks from obtaining insurance coverage from nondomiciliary risk retention groups. The commenter draws the department's attention to the Liability Risk Retention Act (LRRA) at 15 USC 3901 et seq. Under federal law, a risk retention group (RRG) obtains authorization to do business in the state where it is domiciled and the domiciliary state regulates the RRG. The RRG need only register with the insurance commissioner in the other states where it does business. The commenter notes that NEW RULE II(1)(b) would require nondomiciliary RRGs to be approved by the State Auditor and Commissioner of Insurance (State Auditor) to do business in Montana before they could insure a state-chartered bank for the at-risk loan balances associated with the bank's debt cancellation contracts.

RESPONSE #5: The department thanks the commenter for bringing the error in proposed NEW RULE II(1)(b) to the department's attention. NEW RULE II(1)(b) is being amended by the department to conform to the LRRA and to clarify that RRGs do not need to be approved by, but need only register with the office of the State Auditor.

COMMENT #6: A comment was submitted to the department by an RRG domiciled in another state. The RRG's comment was substantially similar to Comment #5 above. The commenter suggested proposed alternative language for inclusion in NEW RULE II(1)(b).

RESPONSE #6: The department thanks the commenter for submitting the comment. The department believes the alternative language that the commenter proposed is appropriate and has amended proposed NEW RULE II(1)(b) accordingly.

COMMENT #7: A comment was received from a membership organization of bank management companies. The organization serves as an administrator of the debt protection programs of numerous national and state banks. The commenter's sister company provides contractual liability insurance policies (CLIPS) covering the risks associated with the programs. The commenter is also a member of the organization that submitted Comment #8 summarized below and concurs with the recommended amendments to the proposed rules that are included in Comment #8. The commenter believes those recommended amendments relating to disclosures and related requirements will assure that consumers are well informed, but will not place unreasonable and unfair burdens on state banks as they compete with national banks offering similar debt cancellation programs.

More specifically, the commenter states that for some state banks, NEW RULE II(1)(b) imposes unnecessary and overly burdensome insurance requirements for the management of risks associated with debt protection programs. The commenter states the insurance must cover a bank's entire debt cancellation program both in and outside of Montana and that many banks desiring to offer debt protection in Montana are not Montana banks. In lieu of the insurance requirement, the commenter asks the department to allow an out-of-state bank to utilize a policy filed and approved with the appropriate state for the policy's issuance.

The commenter states that most, if not all, large state banks have stopped using CLIPs as a method of managing their risk and have instead retained experienced actuaries (either as full time, permanent employees or not) and have established reserves appropriate for the debt protection program risks. The commenter requests that the department allow a bank to post reserves in lieu of insurance.

The commenter also states the language and methodology in the OCC's Part 37 constitute a clear and easily understood process for disclosing information to consumers and should be incorporated into Montana's rules. It states that any additional disclosures should be included in the long form but not in the short form because the long form is the form the consumer will take with them and examine further.

RESPONSE #7: The department thanks the commenter for submitting the comment. The department believes that its rule requirements that have no equivalent or counterpart in the OCC's rules neither place unreasonable or unfair burdens on state banks nor put them at a competitive disadvantage vis-à-vis national banks. The department believes its variances from OCC's rules are minimal and are not onerous; therefore, the variances do not create a competitive disadvantage for state-chartered banks. The department also believes that the variances provide added consumer protection and that they better assure that a bank's safety and soundness is not adversely impacted by its debt cancellation program. HB 432 specifically authorized the department to adopt rules substantially equivalent to or more stringent than federal regulations governing national banks and the department believes it has done so.

A bank may only offer and sell debt cancellation products to Montana customers in relation to specific loans made to those customers either directly or indirectly by the bank. Banks must obtain insurance to cover the at-risk loan balances to which a debt cancellation contract pertains. The commenter raises a point similar to that expressed in Comment #9 relating to out-of-state banks whose at-risk loan balances pertaining to its debt cancellation contracts are insured by an insurer authorized in the bank's home state. The department has amended NEW RULE II to clarify that because the policy holder will be the out-of-state bank and not the Montana consumer, an insurer authorized to issue the policy to the out-of-state bank in the bank's home state would not have to be authorized or otherwise registered with the State Auditor.

Most state-chartered banks in Montana are not large and, to the department's knowledge, none have actuaries on staff. The department believes a bank could lose sight of the extent of its risk associated with debt cancellation contracts. That would pose a risk to the bank's safety and soundness. No state-chartered bank commented that it wanted the option of posting reserves in lieu of maintaining insurance to cover the at-risk loan balances associated with the bank's debt cancellation contracts. The department declines to amend the rule in the manner requested by the commenter because it believes that best practice, consistent with bank safety and soundness principles, is to require insurance coverage. In addition, if no insurance was required, safety and soundness examinations of banks would take longer and would require that the department obtain specialized training for its examiners who are already taxed with a heavy workload. In the department's opinion, those circumstances dictate against allowing the posting of reserves in lieu of maintaining insurance.

The department believes that the Montana-specific disclosures required under NEW RULE III(1)(a) and (1)(g) that have no equivalent or counterpart under the 12 CFR Part 37 provide additional consumer protection, are not onerous, and should be adopted as proposed because they will not appreciably lengthen either the model short-form or long-form disclosures under NEW RULE VIII.

<u>COMMENT #8</u>: A comment was received from an administrator that assists in program development relating to debt cancellation products offered through regional and community banks as part of their direct and indirect lending programs.

The commenter stated that although the proposed rules plainly authorize state-chartered banks to offer GAP waivers through nonexclusive, unaffiliated agents such as automobile dealers, the rules do not explicitly authorize banks to offer other types of debt cancellation products through nonexclusive, unaffiliated agents in connection with the banks' overall indirect lending programs. The commenter stated that the OCC's Interpretive Letters #1093 and #1095 authorize national banks to do so. The commenter asks that the proposed rules be amended in order to clarify that state-chartered banks have the same authority that national banks have to offer debt cancellation products, including but not limited to GAP waivers, through nonexclusive, unaffiliated agents in connection with their overall indirect lending program.

The commenter requests that in NEW RULE I: 1) the definition of guaranteed asset protection (GAP) waiver or agreement be clarified to reflect that it is a type of debt cancellation contract; 2) the definitions of debt cancellation contract and debt suspension agreement be amended to reflect that a debt cancellation product may be offered in conjunction with either direct or indirect extensions of credit; and 3) the defined term "loan or extension of credit" be broken into two terms, "loan" or "extension of credit."

The commenter recommends that NEW RULE IX be amended to include a statement that the financing arrangement for the GAP fee does not create a separate product that violates the anti-tying prohibition in NEW RULE IV(1)(a).

The commenter asks the department to follow the OCC's lead and indefinitely delay the date for mandatory compliance with certain requirements when a debt cancellation product is offered through a nonexclusive, unaffiliated agent in the indirect lending market. See, 68 FR 35283 (June 13, 2003). Specifically, the commenter requests that the department delay requiring state-chartered banks to comply with the following rules as applied to the bank's indirect lending program: 1) the periodic payment option requirement contained in NEW RULE VI(1); 2) the requirement in NEW RULE V(2) that a bank offering a debt cancellation contract without a refund provision also offer a bona fide option to purchase a comparable contract that provides for a refund; 3) use under NEW RULE VIII of the OCC's long-form disclosure in its entirety and the second, third, and fifth provisions in the OCC's short-form disclosure; and 4) the requirement in NEW RULE VII for obtaining a customer's written acknowledgment of receipt of the disclosures. The commenter notes that there are unique problems that these provisions pose in the indirect lending distribution channel.

The commenter objects to the requirement in NEW RULE III(1)(a) that a bank disclose to its customer at the time of offering a debt cancellation product, notice of the prohibited acts and practices contained in NEW RULE IV(1)(b) and (1)(c)(ii). The basis for the objection is that disclosure would be counterproductive, confusing, and would lengthen the disclosure making it less likely that the consumer will read it. As examples, the commenter states disclosure of the prohibition against charging a single lump sum payment for a debt cancellation contract pertaining to a residential mortgage loan would be confusing if the customer's loan is not a residential mortgage loan and disclosing that the bank is prohibited from using misleading advertising goes without saying and serves no purpose. The commenter requests that the disclosure requirement in NEW RULE III(1)(a) be eliminated or limited to requiring disclosure of the prohibited acts contained in NEW RULE IV(1)(a) and (1)(c)(i).

The commenter states that it agrees with another commenter (Comment #9) that NEW RULE III should be amended to more closely mirror 12 CFR 37.6 to provide more clarity and parity within the industry regarding the content and timing of short- and long-form disclosures under varied channels of delivery of debt cancellation products.

<u>RESPONSE # 8</u>: The department agrees with the comment concerning the need for clarification relating to banks offering debt cancellation products in both their direct lending and indirect lending programs. The department has amended the definitions of "debt cancellation contract" and "debt suspension agreement" in NEW RULE I consistent with the definition of "loan or extension of credit" in that same rule. (Also see, response to Comment #3.)

The department has amended NEW RULE IX to state that a GAP waiver or agreement is a type of debt cancellation contract and to clarify that the financing arrangement relating to the fee for a GAP waiver or agreement does not create a separate product that violates the anti-tying prohibition of NEW RULE IV(1)(a). The department has amended NEW RULE I(7) to separately enclose the terms "loan" and "extension of credit" in quotation marks as recommended by the commenter because the terms are used separately rather than as a phrase in the OCC regulation. The amendment is not intended to be substantive but only editorial.

The department declines to delay mandatory compliance by state-chartered banks with the debt cancellation and debt suspension rules in the context of the bank's indirect lending program. The alternative to the department's decision not to delay mandatory compliance by banks with certain rules in the indirect lending context would have been to delay allowing banks to offer debt cancellation products in the indirect lending market at all. The department believes that not allowing banks to offer debt cancellation products through nonexclusive, unaffiliated agents in the indirect lending market at this time would create less parity between state-chartered banks and federal banks than requiring state-chartered banks to comply with all rules in conjunction with both their direct and indirect lending programs. The department believes that since a bank is authorized to offer a debt protection product through a nonexclusive, unaffiliated agent in the indirect lending market, it is not unreasonable to expect it to ensure that the agent delivers the appropriate disclosures and obtains the appropriate acknowledgement of receipt. The department believes that NEW RULE VII, which provides some leeway where a bank has made its best efforts and maintained sufficient documentation of having delivered the mandatory disclosures, adequately addresses the commenter's concerns.

Banks can choose whether to implement their debt protection program in connection with indirect lending at this time or not.

The department declines to delete from NEW RULE III(1)(a) or to modify it to state that the only prohibitions in NEW RULE IV that must be disclosed are the prohibitions against conditioning the extension of credit on the purchase of debt protection products and against unilateral modification of a debt cancellation contract or debt suspension agreement by the bank except in certain limited circumstances. The department believes that purchasers of debt protection products who are aware of all of the prohibitions in NEW RULE IV are in a better position to assert the protections that NEW RULE IV affords. The department sees no reason why some, but not all, of the prohibitions should be disclosed.

The commenter's recommendation that NEW RULE III be amended to more closely mirror 12 CFR 37.6 was echoed by several commenters. Although there is information contained in NEW RULE VII (which is patterned after 12 CFR 37.7) that is to some degree duplicated in 12 CFR 37.6, and 12 CFR 37.6 also includes what is arguably minutiae, the department has no good reason for not complying with the commenter's recommendation, which will facilitate uniformity for administrators of banks' debt protection programs operating in multiple states. NEW RULE III has been amended to more closely mirror 12 CFR 37.6.

The department believes that since a bank is authorized to offer a debt protection product through a nonexclusive, unaffiliated agent in the indirect lending market, it is not unreasonable to expect the bank to ensure that the agent delivers the appropriate disclosures and obtains the appropriate acknowledgement of receipt. The department believes that NEW RULE VII, which provides some leeway where a bank has made its best efforts and maintained sufficient documentation of having delivered the mandatory disclosures, adequately addresses the commenter's concerns.

<u>COMMENT # 9</u>: A comment was submitted by a national trade association of insurance companies and other financial service providers selling or servicing credit protection products typically provided in connection with consumer credit transactions.

The commenter objects to the enhanced disclosure requirements [in NEW RULE III(1)(a) and (1)(g)] because they are more onerous than the OCC regulation governing national banks' debt cancellation and debt suspension programs and therefore they may create an uneven playing field for state-chartered banks. The commenter states that the industry has been working within the framework of the OCC disclosure requirements under 12 CFR Part 37 for years and that not varying from the OCC disclosure requirements in 12 CFR 37.6 will enable the industry to timely and consistently provide meaningful disclosures to consumers. The commenter recommends that NEW RULE II be amended to more closely mirror 12 CFR 37.6. The commenter states that the department has not identified any flaw or failure in the OCC's debt cancellation/debt suspension regulation at 12 CFR Part 37 warranting variance from that regulation. The commenter states that variance from the OCC regulation will affect the precedential value to the department of the OCC's experience in interpreting and enforcing 12 CFR Part 37. The commenter recommends that NEW RULE VIII not be adopted and that the text of NEW RULE III concerning disclosures be replaced with a single rule containing the required content of short- and long-form disclosures (not identical to Appendices A and B of 12 CFR Part 37); the "applicable" disclosures contained in NEW RULE IV(1)(a) and (1)(c)(i); disclosures containing content similar to that in NEW RULE VII; and list the rules for which mandatory compliance is delayed if a bank offers a debt cancellation contract or debt suspension agreement to a customer through a nonexclusive, unaffiliated agent in connection with closed-end consumer credit.

The commenter states that in order to be consistent with OCC guidelines and to maintain parity between state-chartered banks and national banks, the department should authorize banks to offer debt cancellation products as part of their indirect lending programs. The commenter asks that the department clarify that its rules apply to extensions of credit originated by another and assigned to or purchased by a bank.

The commenter requests that, like the OCC, the department delay the banks' mandatory date for compliance with certain rules as they would otherwise apply to offers/sales of debt cancellation contracts/debt suspension agreements in connection with a bank's indirect lending program, specifically compliance with NEW RULE V(2), NEW RULE VI(1), NEW RULE VII(1) related, respectively, to refunds, periodic installment payments, and obtaining the customer's written affirmative election to purchase and written acknowledgment of receipt of disclosures before entering into a debt cancellation contract or debt suspension agreement.

The commenter requests that the department clarify that a stand-alone GAP product is a type of debt cancellation contract and include a statement to that effect in the definition of "guaranteed asset protection (GAP) waiver or agreement" in NEW RULE I.

The commenter states that the department inadvertently used language in NEW RULE II(1)(b) that will impose an unintended requirement on out-of-state banks. Specifically, the commenter states that if an out-of-state bank has been issued an insurance policy to cover its risks associated with its debt cancellation/debt suspension program, the insurance company should not be subject to having the policy approved by the State Auditor.

The commenter states that if a bank is sufficiently large to evaluate its risk and establish a reserve, the current rule language would not allow the bank to do so. Therefore, the commenter requests that the department amend NEW RULE II(1)(b) to authorize banks to establish a reserve in lieu of obtaining insurance covering its risks associated with the bank's debt protection program.

RESPONSE #9: The department does not believe that the additional disclosures required under NEW RULE III(1)(a) and (1)(g) are onerous or that they create a perceptively uneven playing field between Montana banks and national banks. For example, no comments or materials were provided to show that activation of a debt cancellation contract is not a taxable event and only one commenter objected to that particular disclosure. Those circumstances reinforce the department's belief that disclosure of the potential tax liability is not onerous or unfair to state-chartered banks. The precedential value to the department of the OCC's experience in interpreting and enforcing 12 CFR Part 37 will not be affected by the additional disclosures required under NEW RULE III(1)(a) and (1)(g). Any OCC precedent regarding a national bank's management of risks associated with debt cancellation products through insurance would have precedential value to the department. Any OCC experience with a national bank whose safety and soundness are negatively impacted by the bank's management of its risks without insurance would also be valuable to the department. In response to this commenter's recommendation echoed by others, the department has amended NEW RULE III to more closely mirror 12 CFR 37.6. NEW RULE VIII states that the OCC disclosure forms adapted to include Montana-specific disclosures are adopted as models and not as requirements. Therefore, a bank's adapted disclosure forms that are substantially similar to the model forms will satisfy the disclosure requirements. The department does not believe that the disclosure requirements of these rules will adversely affect either the timeliness or meaningfulness of disclosures made to bank customers in Montana pursuant to these rules.

The department agrees with the comment expressed by numerous commenters that there is a need for the department to clarify the ability of banks to offer debt protection products other than GAP waivers in conjunction with the banks' indirect lending programs. The department has amended the definitions of "debt cancellation contract" and "debt suspension agreements" in NEW RULE I to clarify the issue. A loan or extension of credit is defined in NEW RULE I as the *direct or indirect* advance of funds to a customer made on the basis of an obligation to repay the funds. The amended definitions will make clear that a bank may offer debt protection products other than GAP waivers pertaining to retail installment sales contracts purchased by or assigned to the bank on the indirect lending market.

The department declines to follow the OCC's decision in 2003 to indefinitely delay mandatory compliance by national banks with certain debt cancellation/suspension rules in 12 CFR 37 in the context of indirect lending. The Notice of Public Hearing on Proposed Adoption for MAR 2-49-452 was published August 11, 2011. The department believes there has been ample time for banks and industry interests to prepare for full compliance but if additional time is needed, implementation of a bank's debt cancellation/debt suspension program as applied to indirect lending should be postponed until full compliance can be achieved.

The department agrees with the comment concerning a GAP waiver being a type of debt cancellation contract and has amended NEW RULE IX accordingly. The comment relating to the requirement that the insurer of an out-of-state bank's contractual liability associated with its debt cancellation contracts be authorized by or otherwise registered with Montana's State Auditor is well-taken. The department has amended NEW RULE II to clarify that the out-of-state bank must obtain and maintain in effect in the bank's home state insurance covering the at-risk loan balances on Montanans' loans to which the bank's debt cancellation contracts pertain, but the insurer need not be authorized by or registered with the State Auditor in Montana. The department consulted with the office of the State Auditor concerning the comment. Because the policy holder would be the out-of-state bank and not the Montana consumer, the insurer of the out-of-state bank's debt protection program need not be authorized by or registered with the State Auditor in Montana.

The department declines to allow a bank to post reserves in lieu of obtaining insurance to cover the at-risk loan balances associated with its debt cancellation contracts. The department deems the insurance requirement to indirectly be a consumer protection tool in addition to being a "best practice" consistent with bank safety and soundness principles.

By: /s/ Janet R. Kelly	By: /s/ Michael P. Manion
Janet R. Kelly, Director	Michael P. Manion, Rule Reviewer
Department of Administration	Department of Administration

Certified to the Secretary of State December 12, 2011.